Natural law

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Natural law or the **law of nature** (Latin: *lex naturalis*) is a theory that posits the existence of a law whose content is set by nature and that therefore has validity everywhere.[1] The phrase *natural law* is sometimes opposed to the positive law of a given political community, society, or nation-state, and thus can function as a standard by which to criticize that law. In natural law jurisprudence, on the other hand, the content of positive law cannot be known without some reference to the natural law (or something like it). Used in this way, natural law can be invoked to criticize decisions about the statutes, but less so to criticize the law itself. Some use natural law synonymously with natural justice or natural right (Latin *ius naturale*), although most contemporary political and legal theorists separate the two.

Natural law theories have exercised a profound influence on the development of English common law,[2] and have featured greatly in the philosophies of Thomas Aquinas, Francisco Suárez, Richard Hooker, Thomas Hobbes, Hugo Grotius, Samuel von Pufendorf, and John Locke. Because of the intersection between natural law and natural rights, it has been cited as a component in United States Declaration of Independence.

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History

The use of natural law, in its various incarnations, has varied widely through its history. There are a number of different theories of natural law, differing from each other with respect to the role that morality plays in determining the authority of legal norms. This article will deal with its usages separately rather than attempt to unify them into a single theory.

Aristotle

Greek philosophy emphasized the distinction between "nature" (*physis*, *φύσις*) on the one hand and "law", "custom", or "convention" (*nomos*, *νόμος*) on the other. What the law commanded varied from place to place, but what was "by nature" should be the same everywhere. A "law of nature" would therefore have had the flavor more of a paradox than something which obviously existed.[1] Against the conventionalism that the distinction between nature and custom could engender, Socrates and his philosophic heirs, Plato and Aristotle, posited the existence of natural justice or natural right (*dikaion physikon*, *δικαιον φυσικον*, Latin *ius naturale*). Of these, Aristotle is often said to be the father of natural law.[3]

Aristotle's association with natural law is due largely to the interpretation given to his works by Thomas Aquinas.[4] This was based on Aquinas's conflation of natural law and natural right, the latter of which Aristotle posits in Book V of the *Nicomachean Ethics* (Book IV of the *Eudemian Ethics*). Aquinas's influence was such as to affect a number of early translations of these passages,[5] though more recent translations render them more literally.[6] Aristotle notes that natural justice is a species of political justice, viz. the scheme of distributive and corrective justice that would be established under the best political community;[7] were this to take the form of law, this could be called a natural law, though Aristotle does not discuss this and suggests in the *Politics* that the best regime may not rule by law at all.[8]

The best evidence of Aristotle's having thought there was a natural law comes from the *Rhetoric*, where Aristotle notes that, aside from the "particular" laws that each people has set up for itself, there is a "common" law that is according to nature.[9] The context of this remark, however, suggests only that Aristotle advised that it could be rhetorically advantageous to appeal to such a law, especially when the "particular" law of one's own city was averse to the case being made, not that there actually was such a law;[10] Aristotle, moreover, considered two of the three candidates for a universally valid, natural law provided in this passage to be wrong.[1] Aristotle's theoretical paternity of the natural law tradition is consequently disputed.

Stoic natural law

The development of this tradition of natural justice into one of natural law is usually attributed to the Stoics. The rise of natural law as a universal system coincided with the rise of large empires and kingdoms in the Greek world. [11] Whereas the "higher" law to which Aristotle suggested one could appeal was emphatically natural, in contradistinction to being the result of divine positive legislation, the Stoic natural law was indifferent to the divine or natural source of the law: the Stoics asserted the existence of a rational and purposeful order to the universe (a divine or eternal law), and the means by which a rational being lived in accordance with this order was the natural law, which spelled out action that accorded with virtue.[1] Stoics emphasized the universal ideas of individual worth, moral duty, and universal brotherhood. These theories became highly influential among Roman jurists, and consequently played a great role in subsequent legal theory.

Christian natural law

A number (though not all) of the early Church Fathers sought to incorporate it into Christianity. This was true in the West more so than in the East. The most notable among these was Augustine of Hippo, who equated natural law with man's prelapsarian state; as such, a life according to nature was no longer possible and men needed instead to seek salvation through the divine law and grace of Jesus Christ. In the Twelfth Century, Gratian reversed this, equating the natural and divine laws. Thomas Aquinas restored Natural Law to its independent state, asserting that, as the perfection of human reason, it could approach but not fully comprehend the Eternal law and needed to be supplemented by Divine law. See also Biblical law in Christianity.

All human laws were to be judged by their conformity to the natural law. An unjust law was in a sense no law at all. At this point, the natural law was not only used to pass judgment on the moral worth of various laws, but also to determine what the law said in the first place. This could result in some tension.[12]

The natural law was inherently deontological in that although it is aimed at goodness, it is entirely focused on the ethicalness of actions, rather than the consequence. The specific content of the natural law was therefore determined by a conception of what things constituted happiness, be they temporal satisfaction or salvation. The state, in being bound by the natural law, was conceived as an institution directed at bringing its subjects to true happiness. In the 16th century, the School of Salamanca (Francisco Suárez, Francisco de Vitoria, etc.) further developed a philosophy of natural law. After the Church of England broke from Rome, the English theologian Richard Hooker adapted Thomistic notions of natural law to Anglicanism.

Islamic natural law

The Maturidi school, the second largest school of Sunni theology, posits the existence of a form of natural law. Abu Mansur al-Maturidi stated that the human mind could know of the existence of God and the major forms of 'good' and 'evil' without the help of revelation. Al-Maturidi gives the example of stealing which is known to be evil by reason alone due to man's working hard for his property. Killing, fornication, and drinking alcohol were all 'evils' which the human mind could know of according to al-Maturidi.

The concept of *Istislah* in Islamic law bears some similarities to the natural law tradition in the West, as exemplified by Thomas Aquinas. However, whereas natural law deems good that which is known self-evidently to be good, according as it tends towards the fulfilment of the person, *istislah* calls good whatever is connected to one of five "basic goods". Al-Ghazali abstracted these "basic goods" from the legal precepts in the Qur'an and Sunnah: they are religion, life, reason, lineage and property. Some add also "honour".

Ibn Qayyim al-Jawzi also posited that human reason could discern between 'great sins' and good deeds.

Abū Rayhān al-Bīrūnī, an Islamic scholar and polymath scientist, understood natural law as the law of the jungle. He argued that the antagonism between human beings can only be overcome through a divine law, which he believed to have been sent through prophets. This is also the position of the Ashari school, the largest school of Sunni theology.[13]

Averroes (Ibn Rushd), in his treatise on *Justice and Jihad* and his commentary on Plato's *Republic*, writes that the human mind can know of the unlawfulness of killing and stealing and thus of the five maqasid or higher intents of the Islamic sharia or to protect religion, life, property, offspring, and reason. The concept of natural law entered the mainstream of Western culture through his Aristotelian commentaries, influencing the subsequent Averroist movement and the writings of Thomas Aquinas.[14]

Hobbes' natural law

By the Seventeenth Century, the Medieval teleological view came under intense criticism from some quarters. Thomas Hobbes instead founded a contractualist theory of legal positivism on what all men could agree upon: what they sought (happiness) was subject to contention, but a broad consensus could form around what they feared (violent death at the hands of another). The natural law was how a rational human being, seeking to survive and prosper, would act. It was discovered by considering humankind's natural rights, whereas previously it could be said that natural rights were discovered by considering the natural law. In Hobbes' opinion, the only way natural law could prevail was for men to submit to the commands of the sovereign. Because the ultimate source of law now comes from the sovereign, and the sovereign's decisions need not be grounded in morality, legal positivism is born. Jeremy Bentham's modifications on legal positivism further developed the theory.

As used by Thomas Hobbes in his treatises *Leviathan* and *De Cive*, natural law is "a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved."

According to Hobbes, there are nineteen Laws. The first two are expounded in chapter XIV of Leviathan("of the first and second natural laws; and of contracts"); the others in chapter XV ("of other laws of nature").

- The first Law of nature is *that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war*.
- The second Law of nature is *that a man be willing, when others are so too, as far forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself*.
- The third Law is *that men perform their covenants made.* In this law of nature consisteth the fountain and original of justice... when a covenant is made, then to break it is unjust and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just.
- The fourth Law is *that a man which receiveth benefit from another of mere grace, endeavour that he which giveth it, have no reasonable cause to repent him of his good will.* Breach of this law is called ingratitude.
- The fifth Law is complaisance: *that every man strive to accommodate himself to the rest.* The observers of this law may be called sociable; the contrary, stubborn, insociable, froward, intractable.
- The sixth Law is *that upon caution of the future time, a man ought to pardon the offences past of them that repenting, desire it.*
- The seventh Law is *that in revenges, men look not at the greatness of the evil past, but the greatness of the good to follow.*
- The eighth Law is *that no man by deed, word, countenance, or gesture, declare hatred or contempt of another*. The breach of which law is commonly called contumely.
- The ninth Law is *that every man acknowledge another for his equal by nature*. The breach of this precept is pride.
- The tenth law is *that at the entrance into the conditions of peace, no man require to reserve to himself any right, which he is not content should be reserved to every one of the rest.* The breach of this precept is arrogance, and observers of the precept are called modest.
- The eleventh law is that *if a man be trusted to judge between man and man, that he deal equally between them.*
- The twelfth law is *that such things as cannot be divided, be enjoyed in common, if it can be; and if the quantity of the thing permit, without stint; otherwise proportionably to the number of them that have right.*
- The thirteenth law is *that those things which cannot be enjoyed in common, nor divided, ought to be adjudged to the first possessor; and in some cases to the first born, as acquired by lot.*
- The fourteenth law is *that all men that mediate peace be allowed safe conduct.*
- The fifteenth law is *that they that are at controversy submit their right to the judgment of an arbitrator*.
- The sixteenth law is *that no man is a fit arbitrator in his own cause.*

Liberal natural law

Liberal natural law grew out of the medieval Christian natural law theories and out of Hobbes' revision of natural law, sometimes in an uneasy balance of the two.

Hugo Grotius based his philosophy of international law on natural law. In particular, his writings on freedom of the seas and just war theory directly appealed to natural law. About natural law itself, he wrote that "even the will of an omnipotent being cannot change or abrogate" natural law, which "would maintain its objective validity even if we should assume the impossible, that there is no God or that he does not care for human affairs." (*De iure belli ac pacis*, Prolegomeni XI). This is the famous argument *etiamsi daremus* (*non esse Deum*), that made natural law no longer dependent on theology.

John Locke incorporated natural law into many of his theories and philosophy, especially in *Two Treatises of Government*. There is considerable debate about whether his conception of natural law was more akin to that of Aquinas (filtered through Richard Hooker) or Hobbes' radical reinterpretation, though the effect of Locke's understanding is usually phrased in terms of a revision of Hobbes upon Hobbesean contractualist grounds. Locke turned Hobbes' prescription around, saying that if the ruler went against natural law and failed to protect "life, liberty, and property," people could justifiably overthrow the existing state and create a new one.

While Locke spoke in the language of natural law, the content of this law was by and large protective of natural rights, and it was this language that later liberal thinkers preferred. Thomas Jefferson, echoing Locke, appealed to unalienable rights in the *Declaration of Independence*, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

The Belgian philosopher of law Frank van Dun is one among those who are elaborating a secular conception[1] (http://users.ugent.be/~frvandun /Texts/Logica/NaturalLaw.htm) of natural law in the liberal tradition. However, a secular critique of the natural law doctrine was stated by Pierre Charron in his *De la sagesse* (1601): "The sign of a natural law must be the universal respect in which it is held, for if there was anything that nature had truly commanded us to do, we would undoubtedly obey it universally: not only would every nation respect it, but every individual. Instead there is nothing in the world that is not subject to contradiction and dispute, nothing that is not rejected, not just by one nation, but by many; equally, there is nothing that is strange and (in the opinion of many) unnatural that is not approved in many countries, and authorized by their customs."

Contemporary Catholic understanding

The Roman Catholic Church holds the view of natural law set forth by Thomas Aquinas, particularly in his *Summa Theologica*, and often as filtered through the School of Salamanca. This view is also shared by some Protestant churches.[15]

The Catholic Church understands human beings to consist of body and mind, the physical and the non-physical (or soul perhaps), and that the two are inextricably linked. Humans are capable of discerning the difference between good and evil because they have a conscience. There are many

manifestations of the good that we can pursue. Some, like procreation, are common to other animals, while others, like the pursuit of truth, are inclinations peculiar to the capacities of human beings.

To know what is right, one must use one's reason and apply it to Aquinas' precepts. This reason is believed to be embodied, in its most abstract form, in the concept of a primary precept: "Good is to be sought, evil avoided."[16] St. Thomas explains that:

> there belongs to the natural law, first, certain most general precepts, that are known to all; and secondly, certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles. As to those general principles, the natural law, in the abstract, can nowise be blotted out from men's hearts. But it is blotted out in the case of a particular action, insofar as reason is hindered from applying the general principle to a particular point of practice, on account of concupiscence or some other passion, as stated above (77, 2). But as to the other, i.e., the secondary precepts, the natural law can be blotted out from the human heart, either by evil persuasions, just as in speculative matters errors occur in respect of necessary conclusions; or by vicious customs and corrupt habits, as among some men, theft, and even unnatural vices, as the Apostle states (Rm. i), were not esteemed sinful.[17]

However, while the primary and immediate precepts cannot be "blotted out", the secondary precepts can be. Therefore, for a deontological ethical theory they are open to a surprisingly large amount of interpretation and flexibility. Any rule that helps man to live up to the primary or subsidiary precepts can be a secondary precept, for example:

- Drunkenness is wrong because it injures one's health, and worse, destroys one's ability to reason, which is fundamental to man as a rational animal (i.e. does not support self preservation).
- Theft is wrong because it destroys social relations, and man is by nature a social animal (i.e. does not support the subsidiary precept of living in society).

Natural moral law is concerned with both exterior and interior acts, also known as action and motive. Simply doing the right thing is not enough; to be truly moral one's motive must be right as well. For example, helping an old lady across the road (good exterior act) to impress someone (bad interior act) is wrong. However, good intentions don’t always lead to good actions. The motive must coincide with Aquinas's cardinal or theological virtues. Cardinal virtues are acquired through reason applied to nature; they are:

1. Prudence
2. Justice
3. Temperance
4. Fortitude

His theological virtues are:

1. Faith
2. Hope
3. Charity

According to Aquinas, to lack any of these virtues is to lack the ability to make a moral choice. For example, consider a man who possesses the virtues of justice, prudence, and fortitude, yet lacks temperance. Due to his lack of self control and desire for pleasure, despite his good intentions, he will find himself swaying from the moral path.

In contemporary jurisprudence

In jurisprudence, *natural law* can refer to the several doctrines:

- That just laws are immanent in nature; that is, they can be "discovered" or "found" but not "created" by such things as a bill of rights;
- That they can emerge by the natural process of resolving conflicts, as embodied by the evolutionary process of the common law; or
- That the meaning of law is such that its content cannot be determined except by reference to moral principles. These meanings can either oppose or complement each other, although they share the common trait that they rely on inherence as opposed to design in finding just laws.

Whereas legal positivism would say that a law can be unjust without it being any less a law, a natural law jurisprudence would say that there is something legally deficient about an unjust law. Legal interpretivism, famously defended in the English speaking world by Ronald Dworkin, claims to have a position different from both natural law and positivism.

Besides utilitarianism and Kantianism, natural law jurisprudence has in common with virtue ethics that it is a live option for a first principles ethics theory in analytic philosophy.

The concept of natural law was very important in the development of the English common law. In the struggles between Parliament and the monarch, Parliament often made reference to the Fundamental Laws of England which were at times said to embody natural law principles since time immemorial and set limits on the power of the monarchy. According to William Blackstone, however, natural law might be useful in determining the content of the common law and in deciding cases of equity, but was not itself identical with the laws of England. Nonetheless, the implication of natural law in the common law tradition has meant that the great opponents of natural law and advocates of legal positivism, like Jeremy Bentham, have also been staunch critics of the common law.

Natural law jurisprudence is currently undergoing a period of reformulation (as is legal positivism). The most prominent contemporary natural law jurist, Australian John Finnis, is based in Oxford, but there are also Americans Germain Grisez, Robert P. George, and Canadian Joseph Boyle. All

have tried to construct a new version of natural law. The 19th-century anarchist and legal theorist, Lysander Spooner, was also a figure in the expression of modern natural law.

"New Natural Law" as it is sometimes called, originated with Grisez. It focuses on "basic human goods," such as human life, knowledge, and aesthetic experience, which are self-evidently and intrinsically worthwhile, and states that these goods reveal themselves as being incommensurable with one another.

See also

- Aristotle
- Thomas Aquinas
- Jean Barbeyrac
- Richard Cumberland
- John Finnis
- Hugo Grotius
- Thomas Hobbes
- John Locke
- Samuel von Pufendorf
- Legal positivism
- Natural justice
- Natural rights
- Naturalistic fallacy
- School of Salamanca
- Stoicism
- Substantive due process
- Unenumerated rights

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